

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 26TH NOVEMBER 2007 / 5TH AGRAHAYANA 1929

CRP.No. 365 of 2004

(IA 9768/2002 IN OS.2347/1992 of II ADDL.MUNSIFF COURT,TRIVANDRUM)

REVN. PETITIONERS/COUNTER PETITIONERS/ DEFENDANTS:

1. P.RAJAMMA,
PADMAVILASATHU PUTHEN BUNGLOW, PONGUMMOODU,
MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM.
2. R.SARALA KUMARI,
RESIDING AT PADMAVILASATHU PUTHEN BUNGLOW,
PONGUMMOODU, MEDICAL COLLEGE P.O.,
THIRUVANANTHAPURAM.
3. P.SANALKUMAR,
RESIDING AT PADMAVILASATHU PUTHEN BUNGLOW,
PONGUMMOODU,MEDICAL COLLEGE P.O.,
THIRUVANANTHAPURAM.
4. MEENAKUMARI,
RESIDING AT PADMAVILASATHU PUTHEN BUNGLOW,
PONGUMMOODU, MEDICAL COLLEGE P.O.,
THIRUVANANTHAPURAM.
5. AJITH KUMAR,
RESIDING AT PADMAVILASATHU PUTHEN BUNGLOW,
PONGUMMOODU, MEDICAL COLLEGE P.O.,
THIRUVANANTHAPURAM.

BY ADV. SRI.R.S.KALKURA

RESPONDENTS/PETITIONERS/ PLAINTIFFS:

1. SULOCHANAN, S/O. KUTTAN,
KATTILVEEDU, ARCHANA NAGAR, PONGUMMOODU,
THIRUVANANTHAPURAM.

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2. RAVEENDRAN, S/O. VELUKUTTY,
KATTIL VEEDU, ARCHANA NAGAR, PONGUMMOODU OF
-DO- -DO-.
3. JAYA, W/O. LATE SURESH BABU,
RESIDING AT KATTILVEEDU, ARCHANA NAGAR,
PONGUMMOODU, THIRUVANANTHAPURAM.
4. ADARAH (MINOR), S/O. LATE SURESH BABU,
RESIDING AT KATTILVEEDU, ARCHANA NAGAR,
PONGUMMOODU, THIRUVANANTHAPURAM, REPRESENTED BY
HIS MOTHER AND LEGAL GUARDIAN THE 3RD RESPONDENT,
JAYA.

BY ADV. SRI.J.HARIKUMAR
ADV. SRI.HARIKUMAR.S.

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 26/11/2007, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

CRP.No. 365 of 2004

ORDER ON I.A.NO. 1144 OF 2004 IN C.R.P NO. 365 OF 2004

DISMISSED.

26.11.2007

SD/- K.T. SANKARAN, JUDGE.

/TRUE COPY/

P.A. TO JUDGE.

K.T. SANKARAN, J.

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C.R.P. No. 365 OF 2004
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Dated this the 26th November, 2007

ORDER

Hypertechnical contentions raised by the parties caused delay of about more than 10 years in disposing of two Interlocutory Applications. In the meantime, the first plaintiff died, the second plaintiff's wife committed suicide and the third plaintiff fell seriously ill. The defendant also died and his legal representatives are on record. Still the trial of the case is not started and the parties are fighting each other on two interlocutory applications.

2. The revision petitioners are the legal representatives of the defendants in O.S.No. 2347 of 1992 on the file of the court of the II Addl. Munsiff, Thiruvananthapuram. The suit was filed by the since deceased first plaintiff and respondents 1 and 2 herein, viz., Sulochana and Raveendran for fixation of boundary and for consequential injunction. The dispute centres round the identity of 33 cents of land claimed by the plaintiffs. According to the plaintiffs, the property was purchased by the plaintiffs from one Velukutty. Velukutty had lease hold right as per an oral lease in the year 1952. According to the defendants, 33 cents of land forms part of a larger extent of 1 acre 17 cents which belonged to a 'tarwad', under whom the defendants claim title. The property was outstanding on mortgage. The tarwad redeemed some of the mortgages and obtained possession of 84 cents of land. In 1963, there was a

partition in the tarwad, by which 33 cents of land was allotted to executant Nos 2, 6 and 16 and they were allotted properties shown in 'I' Schedule. The extent of 84 cents of land which tarwad got possession, was sold by the sharers to whom it was allotted, in favour of Padmanabha Pillai, the father of the defendants. 33 cents of land continued in the possession of strangers. Though the defendants have no claim in respect of 33 cents of land, they have a contention that under the guise of putting forward a right to possess 33 cents of land, the plaintiffs wanted to encroach upon a portion of the extent of 84 cents of land belonging to the defendants. The application for temporary injunction was contested. Though the trial court granted temporary injunction, that order was set aside in C.M.A.No.22 of 1993 . Though C.R.P.No. 704 of 1993 was filed by the plaintiffs against the judgment of the lower appellate court, the revision was disposed of holding that there was no prima facie case for granting temporary injunction. This court directed the trial court to dispose of the suit within a period of six months.

3. The plaintiffs had filed an application for appointing a commissioner to inspect the property. On the allegation that the plaintiffs did not co-operate with the commissioner, a memo was filed by him stating that to effectively carry out the work, survey plan of the property was highly necessary. The trial court directed the plaintiffs to produce the survey plan. Time was granted on several

occasions to produce the survey plan. As the plaintiffs failed to produce the survey plan, the trial court dismissed the application for issuing a commission.

4. The suit was included in the special list for trial on 08.03.1996. I.A.No. 2088 of 1996 was filed by the plaintiffs for removing the case from the special list. The trial court adjourned the case to 11.03.1996. On that day, viz., 11.03.1996, the suit was dismissed for default for non-appearance of the plaintiffs.

5. On 11.03.1996 itself, an application was filed by the plaintiffs to review the order dated 11.03.1996. In that application, reference was made to I.A. 2088 of 1996. Probably on raising a contention that I.A. No. 2170 of 1996 was not filed to restore the suit which was dismissed for default, I.A.NO. 6930 of 1996 was filed by the plaintiffs to amend I.A.No. 2170 of 1996 so as to incorporate the necessary averments and necessary reliefs, including a prayer for restoration of the suit which was dismissed for default. The trial court allowed the application for amendment (I.A. 6930 of 1996) on 13.06.1997. On 11.08.1996 I.A.No.2170 of 1996, the application under Order IX Rule 9 was allowed by the trial court. Challenging the orders in I.A.Nos. 2170 of 1996 and 6930 of 1996, C.R.P.No. 1869 of 1998 was filed by the defendants. As per the order dated 03.11.1998, this court allowed the revision, set aside the orders passed by the court below and directed the court below to consider the

applications afresh. The revision was allowed on the ground that the trial court erroneously assumed that the defendants had not filed objections in I.A.Nos. 2170 of 1996 and 6930 of 1996.

6. After the disposal of the Civil Revision Petition No.1869 of 1998, the trial court dismissed both the applications (I.A.Nos. 2170 of 1996 and 6930 of 1996) as not maintainable by its order dated 15.12.1998. The trial court took a curious view that I.A.No. 2170 of 1996 was an application to review the order in I.A.No. 2088 of 1996 and even after amendment there was no prayer for restoration of the suit. This finding was quite erroneous for two reasons: Firstly, the prayer in I.A.No.6930 of 1996 was to amend the averments in the application and the reliefs in I.A. 2170 of 1996 so as to make it an application for restoration of the suit. Secondly, an application for restoration of I.A.No. 2088 of 1996 would not be maintainable when the suit itself was dismissed for default. If no application for restoration of the suit was filed, it cannot be assumed that the High Court directed the trial court to consider an application which was not maintainable. The order dated 15.12.1998 was challenged by the plaintiffs in C.M.A.No. 9 of 1999. The lower appellate court dismissed the appeal on the ground that against the order in I.A.No.6930 of 1996, which is an application for amendment of I.A.No.2170 of 1996, no appeal would lie. When no amendment could be carried out, it is to be taken that there was no prayer

for restoration of the suit as well. On these reasonings C.M.A.No. 9 of 1999 was dismissed on 06.08.2002. That judgment was not challenged by the plaintiffs before this court and it had become final. The applications were dismissed on technical grounds and the appeal there from was also dismissed on another technical ground.

7. After the judgment in C.M.A.No. 9 of 1999, the plaintiffs filed I.A.No.9768 of 2002 for restoration of the suit under Order IX Rule 9 of the Code of Civil Procedure. I.A. No. 1759 of 2004 was filed to condone the delay of 25 days in filing I.A.No. 9768 of 2002, probably because the defendants raised a contention that there was delay in making the application. Objections were filed by the defendants and the matter was hotly contested by the parties. The court below, by a detailed order dated 17th March, 2004 allowed the applications and restored the suit to file on condition of payment of cost of Rs. 200/- to the defendants. That order is under challenge in this Civil Revision Petition.

8. Before the court below, the plaintiffs had invoked Section 14 of the Limitation Act. They contended that they were diligently prosecuting I.A. 2170 of 1996 and 6930 of 1996 from 1996 to 6.08.2002, the date of disposal of C.M.A.No. 9 of 1999. It was contended by the plaintiffs that after excluding the period for obtaining the certified copy of the judgment in C.M.A.No. 9 of 1999 ,

there was a delay of 25 days in filing I.A.No. 9768 of 2002. The court below stated that the delay is not 25 days, but 63 days on the ground that the plaintiffs could not have excluded the period for obtaining the certified copy of the judgment in C.M.A.No. 9 of 1999. The court below held that the time would commence to run from 11.03.1996 and what could be excluded is the period from the date of filing of I.A.No. 2170 of 1996 to the date of disposal of C.M.A.No. 9 of 1999 on 6.08.2002.

9. Coming to the merits of the application, the court below took note of the death of the first plaintiff, suicide of the wife of second plaintiff and the prolonged illness of the third plaintiff. The court below took note of the fact that the applications filed by the plaintiffs earlier (I.A.No. 2170 of 1996 and 6930 of 1996) were dismissed on technical grounds and on the ground that the applications were not maintainable. The court below also applied Section 14 of the Limitation Act and on facts thought it fit to allow the applications and to restore the suit.

10. Learned counsel for the petitioners/defendants contended that the court below was not justified in applying Section 14 of the Limitation Act. He submitted that Section 14(1) evidently could not be applied because it applies only to suits and not to applications. As far as sub-section 2 of Section 14 of the Limitation Act is concerned, the learned counsel submitted that in order to

apply Section 14(2), the reliefs prayed for in the original application as well as in the second application should be same. He pointed out that in sub-section (2) of Section 14 of the Limitation Act, the expression used is “ for the same relief” whereas under sub-section (1) of Section 14 of the Limitation Act, it is sufficient if the applicant was prosecuting another civil proceeding with due diligence. To apply Section 14(2), the proceedings which the applicant was prosecuting with due diligence must be a civil proceeding and also must be for the same relief. Learned counsel cited the decision in **Rajabapayya vs. Basavayya** (**AIR 1942 Madras 713**) to support this contention. Learned counsel for the petitioner also submitted that in order to apply Section 14 , the petitioners should have been prosecuting the proceeding in 'good faith'. He submitted that the essential requirement of 'good faith' is lacking in the present case and the applications were being prosecuted by the plaintiffs not in 'good faith', but to protract the proceeding. He relied on the decision in **2003 (3) K.L.T. 1179 (Mac-N-Hom Systems vs. P.S. Varrier)** , **AIR 1984 Kerala 91 (M/s. Mookan Devassy Ouseph and Sons v. Rajappan Pillai)** and **2005(1) K.L.T 467 (Kerala State Civil Supplies Corporation vs. M.G.M. Transports)** in support of this contention. In **AIR 1984 Kerala 91**, the case was in respect of institution of a suit in one court and then filing of another suit in another court. Evidently, Section 14 (1) of the Limitation Act applies and the principles are

stated in the decision as to what would constitute 'good faith'.

11. In 2003 (3) K.L.T. 1179, a Division Bench of this Court held that Section 14 of the Limitation Act would not be attracted when a suit is filed in a wrong court owing to the negligence of the party and also held that even if there was a wrong legal advice and the party had acted by that advice, that itself is not a ground to get the benefit of Section 14. In 2005 (1) K.L.T. 467, it was held that the proceeding under Article 226 of the Constitution is not a civil proceeding. The ingredients to constitute Section 14 of the Limitation Act have been stated in this decision.

12. Certain facts are not in dispute. The suit was dismissed on 11.03.1996 for default. On the same day, the plaintiffs approached the court with a prayer to review the order dated 11.03.1996. In the affidavit filed, they stated as to how the default has occurred. However, instead of making the prayer to restore the suit, they used the expression 'review' stating that the judgment in the suit is to be reviewed. What they stated in I.A. 2170 of 1996 was sought to be corrected by filing I.A.No. 6930 of 1996. Though the applications were allowed, it was set aside by the High Court and the trial court was directed to re-consider the matter afresh. The trial court re-considered it. But the facts were not properly adverted to and the conclusions were arrived at on erroneous statement of facts. The appellate court in C.M.A.No.9 of 1999

took a hyper technical approach and dismissed the appeal on the ground that no appeal would lie against the order in I.A.No.6930 of 1996, the application for amendment of the review petition. The matter which was directed to be considered by the High Court was not considered by the trial court as well as the appellate court after the disposal of C.R.P. 1869 of 1998. In these circumstances, the plaintiffs were constrained to file another application as I.A. No. 9768 of 2002 under Order IX Rule 9 and Section 151 of the Code of Civil Procedure to restore the suit which was dismissed for default. They also sought to invoke Section 14 of the Limitation Act to exclude the period during which they were diligently prosecuting the earlier proceedings, which due to defect of jurisdiction and other causes of like nature the court below could not entertain it. I am of the view that the court below was fully justified in passing the impugned order, allowing the applications. It cannot be said that the plaintiffs were not prosecuting the matter with due diligence. The circumstances would clearly indicate that right from 1996, they were diligently prosecuting the proceedings to ventilate their grievances with a prayer to get the suit restored to file, so that they could aspire for disposal of the suit on the merits. Their prayer was turned down not on the merits but on the technicalities. In the said circumstances, the plaintiffs were constrained to approach the court with a second set of applications though after a lapse of several years. On analysis of

the facts and circumstances of the case, the trial court rightly took the view that the period, during which I.A.No. 2170 of 1996 and 6930 of 1996 were being prosecuted by the plaintiffs till 6.08.2002, the date of disposal of C.M.A.No.9 of 1999 should be excluded, invoking Section 14(2) of the Limitation Act. The contentions raised by the petitioners that the present application I.A.No. 9768 of 2002 and I.A.No. 2170 of 1996 were not for the same relief is unsustainable. The plaintiffs wanted their suit to be restored. The words used may be different, but the purpose was same. Therefore, I am of the view that the purpose of the applications in I.A.Nos. 2170 of 1996 and 9768 of 2002 was for getting the same relief.

13. Learned counsel for the petitioners submitted that the application, viz., I.A.No. 2170 of 1996 was to review the order in I.A.No. 2088 of 1996 and the prayer to restore the suit which was dismissed for default would be available only if I.A. 6930 of 1996 was allowed. He submitted that in view of dismissal of C.M.A. 9 of 1999 on the ground that no appeal was maintainable against the order in I.A. No. 6930 of 1996, the prayer for amendment of I.A.No.2170 of 1996 stood negatived. Therefore, I.A.No.2170 of 1996 cannot be treated as an application for the relief which is prayed for in I.A. 9768 of 2002 and Section 14(1) could not be invoked. True, this contention is technically correct. The prayer in the application originally filed and the prayer in second application was

not for the same relief. The prayer in the original application was sought to be amended by another application and the application for amendment was dismissed on technical grounds. The plaintiffs cannot be blamed for not praying for that relief in the original application. For all practical purposes, it should be taken that I.A.No. 2170 of 1996 was for restoration of the suit. Only on question of maintainability, the first application for restoration stood rejected which necessitated filing of the second application. Therefore, all the ingredients of Section 14(2) of the Limitation Act are attracted in the case. I am of the view that the order impugned does not call for any interference on the merits.

14. Learned counsel for the petitioner lastly submitted that the cost awarded is very very low. This contention is correct. The court below has granted cost of only Rs.200/-. The defendants had to spend huge amounts over the years for the pursuit of their contentions, though the contentions are hyper technical in nature. Necessarily, the plaintiffs must share at least a portion of that expenditure incurred by the defendants. I am of the view that cost of Rs.2500/- would be adequate in these circumstances. The only modification required is that instead of payment of cost of Rs. 200/-, the plaintiffs shall pay cost of Rs. 2500/- to the defendants as a condition for allowing I.A.Nos. 9768 of 2002 and 1759 of 2004. The cost shall be paid within

two months from today.

The Civil Revision Petition is disposed of with the above modification.

**K.T. SANKARAN,
JUDGE.**

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